Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-767-95
NH CHAN, MAHADEV SHANKAR AND SHAIK DAUD JJCA
17 APRIL 1996

Companies and Corporations *— Winding up — Liquidator — Provisional liquidators, appointment of — Circumstances in which court will appoint provisional liquidator — Companies Act 1965 s 231*

Companies and Corporations *— Winding up — Receiver — Whether possible for court to appoint receiver in winding up proceeding*

Companies and Corporations *— Winding up — Petition under s 218 — Just and equitable rule — Petitioner sought to wind up company on ground that it was in substance an incorporated partnership — Whether ground sufficient — Whether petitioner must prove existence of situations where partnership might be dissolved by court — Companies Act 1965 s 281*

Companies and Corporations *— Winding up — Petition under s 218 — Petitioner's objective was to compel other shareholders to buy him out at certain price — Whether court could grant winding-up order — Companies Act 1965 s 281*

Civil Procedure *— Appeal — Admission of new evidence — Petitioner of winding-up order alleged that fresh evidence arose from discovery proceedings — Whether evidence could be admitted as of right — Rules of Court of Appeal 1994 r 7 — Courts of Judicature Act 1964 s 69(2)*

The appellant, the second respondent and the third respondent were directors and shareholders of a construction company, Juta Vila (M) Sdn Bhd ('the company'). There were differences between the directors, and on 21 September 1995, the appellant filed a petition to the court, praying inter alia, for an order that the second and third respondents purchase his shares at RM2.82m, and that an interim receiver be appointed 'to prevent mismanagement of the assets of the company'. A winding-up order was sought by way of an alternative on the grounds that the parties had operated the company as though it was a partnership, under s 218(1) of the Companies Act 1965 ('the Act'). The judicial commissioner rejected the appellant's application. the appellant appealed. Meanwhile, on 22 September 1995, the appellant was removed as a director in an extraordinary general meeting of the company. Before the hearing of the appeal proper, the appellant applied to the court to admit fresh evidence which arose from the discovery proceedings embarked by his solicitors, as a matter of right pursuant to r 7 of the Rules of the Court of Appeal 1994 ('the 1994 Rules'), to support his contention that the judicial commissioner had made a wrong decision. The evidence that the appellant sought to adduce were the company's cheques said to be

for payment to a contractor of the company, which were signed by the second and third respondents. The appellant alleged that the reverse of the cheque showed that the money was paid either into the second respondent's creditor's or the second respondent's personal account. The appellant's counsel invited the court to infer from these circumstances that the second respondent had embezzled the money, and that unless an interim receiver was appointed, the embezzling would continue.

Held, dismissing the appeal:

(1) It was not possible for the court to appoint a receiver in winding-up proceedings. In the case of a winding-up proceeding by the court, s 231 of the Act provides for a provisional liquidator to be appointed (see p 671D).

(2) However, a court will not appoint a provisional liquidator consequent upon the presentation of a winding-up petition unless there is good prima facie evidence that the company will be wound up because the company is obviously insolvent, or the company's assets are in jeopardy, or there are other circumstances which makes it imperative for the court to intervene (see p 672A–B); *Re Highfield Commodities Ltd* [1984] 3 All ER 884; [1985] 1 WLR 149 followed.

(3) In determining whether a winding-up order will be made, the court should first look at the sufficiency of the allegations in the petition. The primary facts set out in the petition if assumed to be true and the uncontested evidence taken as a whole must add up to the conclusion that it is imperative that the winding-up order be made (see p 672C); *Tuan Hj Ishak bin Ismail v Leong Hup Holdings Bhd & Ors* [1996] 1 MLJ 661 followed.

(4) Where a company is in substance an incorporated partnership, a winding-up order may be made under the just and equitable rule, in situations where a partnership may be dissolved by the court. In the instant case, the appellant asked for the company to be wound up merely because it was in substance an incorporated partnership. That was not enough. For a winding-up order under the just and equitable rule to be made, in the case of a partnership-like company, there must be shown situations where a partnership may be dissolved by the court. None was shown in the petition (see p 673F–H); *Ebrahimi v Westbourne Gallaries Ltd & Ors* [1973] AC 360 followed.

(5) Further, it appeared that the appellant's objective was not the winding up of the company at all but a mandatory direction to compel the other shareholders to buy him out at RM2.82m and carry on with the company as a going concern. No legal or factual basis was shown as to how or why this court would ever make such an order. Mere apprehensions of mismanagement are

not enough. On the evidence, the judicial commissioner came to the correct decision when he dismissed the application with costs (see pp 674G–H and 675A).

(6) There was absolutely no evidence before the court that the contractor was not a genuine creditor, and that the receipts given by the contractor were good discharge to the company to the extent of these payments (see p 675H–I).

(7) Rule 7 of the 1994 Rules was identical to s 69(2) of the Courts of Judicature Act 1964. This court did not agree that s 69(2) applied to this case because the court was not concerned here with an interlocutory application. Nor does the second limb of s 69(2) apply because the new evidence sought to be adduced related to matters which occurred in 1992 (see pp 675E and 676D).

(8) In any event, the admission of the new evidence was a matter of discretion only, and the court would exercise it against the appellant (see p 676G).

[Bahasa Malaysia summary

Perayu, penentang kedua dan penentang ketiga adalah pengarah dan pemegang saham sebuah syarikat pembinaan, Juta Vila (M) Sdn Bhd ('syarikat tersebut'). Terdapat perselisihan faham di antara pengarah-pengarah itu, dan pada 21 September 1995, perayu memfailkan petisyen di mahkamah, memohon antara lain, satu perintah supaya penentang kedua dan ketiga membeli sahamnya pada harga RM2.82 juta, dan supaya penerima interim dilantik 'untuk mencegah salah pengurusan aset syarikat tersebut'. Perintah penggulungan dipohon sebagai satu alternatif atas alasan bahawa pihak-pihak itu telah menjalankan syarikat itu seolah-olah ianya adalah sebuah perkongsian, di bawah s 218(1) Akta Syarikat 1965 ('Akta tersebut'). Pesuruhjaya kehakiman menolak permohonan perayu. Perayu telah membuat rayuan. Sementara itu, pada 22 September 1995, perayu telah dipecat sebagai pengarah di mesyuarat agung luar biasa syarikat tersebut. Sebelum pembicaraan sebenar rayuan itu, perayu telah memohon kepada mahkamah untuk menerima keterangan baru yang berbangkit daripada prosiding penzahiran yang telah dimulakan oleh peguamcaranya, sebagai satu perkara mengikut hak berdasarkan k 7 Kaedah-Kaedah Mahkamah Rayuan 1994 (' Kaedah-Kaedah 1994'), untuk menyokong hujahnya bahawa pesuruhjaya kehakiman adalah salah dan bahawa pelantikan sepatutnya dibuat. Bukti yang ingin dikemukakan oleh perayu adalah cek-cek syarikat tersebut yang dimaksudkan untuk bayaran kepada kontraktor syarikat tersebut, yang ditandatangani oleh penentang kedua dan ketiga. Perayu mengatakan bahawa bahagian belakang cek itu menunjukkan bahawa wang telah dibayar sama ada ke dalam akaun pemiutang penentang kedua atau akaun persendirian penentang kedua. Peguam pihak

perayu menjemput mahkamah untuk membuat kesimpulan daripada ini bahawa penentang kedua telah menggelapkan wang ini, dan melainkan penerima interim dilantik, penggelapan itu akan berterusan.

Diputuskan, menolak rayuan itu:

(1) Adalah mustahil untuk melantik penerima dalam prosiding penggulungan oleh mahkamah. Dalam kes prosiding penggulungan oleh mahkamah, terdapat peruntukan dalam s 231 Akta tersebut untuk pelantikan penyelesai sementara (lihat ms 671D).

(2) Bagaimanapun, mahkamah tidak akan melantik penyelesai sementara ekoran daripada pengemukaan petisyen penggulungan melainkan terdapat keterangan prima facie yang kukuh bahawa syarikat tersebut jelas tidak solven, atau aset syarikat tersebut berada dalam kebahayaan, atau ada keadaan-keadaan lain yang menjadikannya mustahak untuk mahkamah mencampur tangan (lihat ms 672A–B); *Re Highfield Commodities Ltd* [1984] 3 All ER 884; [1985] 1 WLR 149 diikut.

(3) Dalam menentukan sama ada perintah penggulungan akan dibuat, mahkamah pertama sekali patut melihat kepada kecukupan pengataan dalam petisyen. Fakta-fakta primer yang dinyatakan di dalam petisyen jika dianggap benar dan keterangan yang tidak dipertikaikan diambil secara keseluruhan mesti membawa kepada kesimpulan bahawa adalah mustahak perintah penggulungan dibuat (lihat ms 672C); *Tuan Hj Ishak bin Ismail v Leong Hup Holdings Bhd & Ors* [1996] 1 MLJ 661 diikut.

(4) Jika sesebuah syarikat merupakan perkongsian yang diperbadankan pada amnya, perintah penggulungan boleh dibuat di bawah rukun adil dan saksama, dalam keadaan di mana perkongsian boleh dibubarkan oleh mahkamah. Dalam kes ini, perayu meminta supaya syarikat tersebut digulung hanya kerana ia pada amnya satu perkongsian yang diperbadankan. Itu tidak mencukupi. Untuk membolehkan suatu perintah penggulungan di bawah rukun adil dan saksama dibuat, dalam kes perkongsian seperti syarikat, mesti terdapat keadaan-keadaan di mana perkongsian boleh dibubarkan oleh mahkamah. Tidak ada satu pun yang ditunjukkan di dalam petisyen itu (lihat ms 673F–H); *Ebrahimi v Westbourne Gallaries Ltd & Ors* [1973] AC 360 diikut.

(5) Selanjutnya, nampaknya tujuan perayu bukanlah penggulungan syarikat tersebut semata-mata tetapi satu arahan mandatori untuk memaksa pemegang saham yang lain untuk membeli sahamnya pada harga RM2.82 juta dan meneruskan pengendalian syarikat tersebut. Tidak ada asas undang-undang atau faktual yang ditunjukkan bagaimana atau mengapa mahkamah ini harus membuat perintah seperti itu. Sekadar tanggapan salah urusan tidak mencukupi. Berlandaskan keterangan, pesuruhjaya

kehakiman telah tiba kepada keputusan yang betul apabila beliau menolak permohonan itu dengan kos (lihat ms 674G–H dan 675A).

(6) Tidak terdapat apa-apa keteranganpun pada mahkamah ini bahawa kontraktor itu bukan pemiutang yang sebenar, dan bahawa resit-resit yang diberi oleh kontraktor itu adalah satu pelepasan yang baik kepada syarikat tersebut setakat pembayaran-pembayaran itu (lihat ms 675H–I).

(7) Kaedah 7 Kaedah-Kaedah 1994 adalah sama dengan s 69(2) Akta Mahkamah Kehakiman 1964. Mahkamah ini tidak bersetuju bahawa s 69(2) terpakai dalam kes ini kerana mahkamah tidak memberikan perhatian kepada permohonan interlokutori di sini. Bahagian kedua s 69(2) juga tidak terpakai kerana keterangan baru yang ingin dikemukakan berkaitan dengan perkara-perkara yang berlaku pada tahun 1992 (lihat ms 675E dan 676D).

(8) Dalam apa keadaan pun, penerimaan keterangan baru adalah satu perkara yang hanya bergantung kepada budi bicara, dan mahkamah akan melaksanakannya terhadap perayu (lihat ms 676G).]

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Ebrahimi v Westbourne Gallaries Ltd & Ors [1973] AC 360

Highfield Commodities Ltd, Re [1984] 3 All ER 884; [1985] 1 WLR 149

Ladd v Marshall [1954] 3 All ER 745; 1 WLR 1489

Loch & Anor v John Blackwood Ltd [1924] AC 783

Saul D Harrison & Sons, Re [1994] BCC 162

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433

Tuan Hj Ishak bin Ismail v Leong Hup Holdings Bhd and Ors [1996] 1 MLJ 661

Wondoflex Textiles Pty Ltd, Re [1951] VLR 458

Yenidje Tobacco Co Ltd, Re [1916] 2 Ch 426

Legislation referred to

Companies Act 1965 s 231

Companies (Winding-up) Rules 1972 r 28

Courts of Judicature Act 1964 s 69

Rules of the Court of Appeal 1994 r 7

Appeal from: Winding-up Petition No 28–35–95 (High Court, Ipoh)

Hira Singh (*T Gunaseelan* with him) (*Asbir, Hira Singh & Co*) for the appellant

A Iruthaya Raj (*Raj Selva & Co*) for the respondent

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): This is an appeal against the refusal of the learned judicial commissioner to appoint an interim receiver and manager. Before the hearing of this appeal proper, the appellant applied to us to admit fresh evidence to support his contention that the judicial commissioner was wrong and that the appointment should have been made. We dismissed this application, and we also dismissed the appeal. Our decision to do so was unanimous. Our reasons now follow.

Mr Hira Singh is wrong to ask for the appointment of a receiver and manager as in our view it is not possible to appoint a receiver in winding-up proceedings by the court. In the case of a winding-up proceeding by the court, there is provision in s 231 of the Companies Act 1965 ('the Act') for a provisional liquidator to be appointed. See also *Company Law* by Walter Woon at p 497 where it says:

> In the case of a winding up by the court there is always a *hiatus* between the presentation of the petition and the making of the winding-up order. Many things might happen in the interim. To preserve the status quo, the court may appoint the official receiver or an approved liquidator as provisional liquidator at any time after the presentation of a petition. Any creditor or contributory may apply for the appointment of a provisional liquidator.

and at p 498:

> The provisional liquidator's primary duty is to preserve the status quo pending the court's final determination whether or not the company should be wound up. The object of the appointment of a provisional liquidator is to keep things in status quo and to prevent any creditor obtaining priority. For this reason he usually does not have the power to sell and distribute the company's assets, unless that power is given to him specifically. The provisional liquidator may exercise all the powers of a liquidator, subject however to such limitations and restrictions as may be set in the order appointing him. Upon the appointment of a provisional liquidator, the powers of the directors to act as such are determined, although they retain residual powers to oppose the winding-up petition when it comes for hearing. The provisional liquidator may request the appointment of a special manager to assist in running the business of the company. The directors of the company may be appointed special managers.

The case referred to by Mr Hira Singh, ie *Re Highfield Commodities Ltd* [1984] 3 All ER 884; [1985] 1 WLR 149 is a case which concerns the appointment of a provisional liquidator. Therefore, where it is desired in a winding-up proceeding to protect a company from the attentions of its directors, the proper course would be to apply for the appointment of a provisional liquidator.

But a court will not appoint a provisional liquidator consequent upon the presentation of a winding-up petition unless there is good prima facie evidence that the company will be wound up because the company is obviously insolvent, or the company's assets are in jeopardy, or there are other circumstances which makes it imperative for the court to intervene: See *Re Highfield Commodities Ltd* [1984] 3 All ER 884; [1985] 1 WLR 149 and 7(2) *Halsbury's Laws of England* (4th Ed) para 1490 note 3.

In determining whether a winding-up order will be made, the court should first look to the sufficiency of the allegations in the petition. Reference may be made in this context to what was said in *Tuan Hj Ishak bin Ismail v Leong Hup Holdings Bhd and Ors* [1996] 1 MLJ 661 at pp 678H–681B. The primary facts set out in the petition if assumed to be true and the uncontested evidence taken as a whole must add up to the conclusion that it is imperative that the winding-up order be made.

Kok Fook Sang ('Kok') filed his petition on 21 September 1995. The heading indicates this to be a petition under s 218(1) of the Act. This sub-section contains 11 separate and independent grounds why a winding-up order may be made. It is incumbent upon a petitioner to state which of these grounds he is relying upon and not ask the court to search his petition for facts which may be thought capable of being slotted into some particular sub-section.

Since the court was concerned here with Juta Vila (M) Sdn Bhd ('Juta'), the allegations Kok has made in the petition with regard to his problems with some other businesses called Firenze Enterprise, Plus Parade Sdn Bhd and Globeplex (M) Sdn Bhd, were irrelevant.

The petition avers that the company has four shareholders, namely, the petitioner, Kok Kim Sang (the petitioner's nominee), the second and the third respondents. The petitioner was also a director of the company until his removal as director on 13 August 1995. Paragraph 7 of the petition states:

> 7 In essence your petitioner, the second and third respondents were the beneficial owners of all the shares in the company and operated the company as though it was a partnership.

In *Ebrahimi v Westbourne Gallaries Ltd & Ors* [1973] AC 360 at p 379 Lord Wilberforce said:

> Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles.

There must be something more. There must be shown situations which will enable the winding up court to exercise its equitable jurisdiction to order the company to be wound up. This is how it was put by lord Wilberforce (at p 379):

> The superimposition of equitable considerations requires something more, which typically may include one or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

For instance, if there was a deadlock in the management of the company (which was in substance a partnership) because the members or directors did not get along: see *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426. Similarly, where the petitioner in a partnership like company had been deliberately excluded from the management of the company where there was an agreement or undertaking (*Re Westbourne Gallaries Ltd* [1973] AC 360) or a mutual expectation (*Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433) that he would be allowed to participate in managing the company. Also, where the minority members of a partnership like company have lost confidence in the directors because of their lack of probity in the conduct of the company's affairs: see *Loch & Anor v John Blackwood Ltd* [1924] AC 783 where it was accepted by Lord Shaw that the object of the directors was to keep the petitioners in ignorance so as to acquire their shares at an under value, and *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458 where those in control of the company tried to squeeze a minority member out of the company with the object of making his position intolerable.

Put shortly, what it means is this, where a company is in substance an incorporated partnership, a winding-up order may be made (under the just and equitable rule) in situations where a partnership may be dissolved by the court. But where the company is not in substance an incorporated partnership, such situations are no longer grounds for a winding-up order to be made under the rule as the use of the partnership analogy is no longer valid.

In the instant case, the petitioner asks for the company to be wound up merely because it is in substance an incorporated partnership. But that is not enough. For a winding-up order under the just and equitable rule to be made, in the case of a partnership like company, there must be shown situations where a partnership may be dissolved by the court. None are shown in the petition.

Juta was incorporated on 21 November 1991. The authorized capital was RM5m. The issued capital was RM1,857,000. Kok claims in the petition that he held 75,710 shares in his own name and that one Kok Kim Sang held 68,050 shares as his nominee. He also claims that he, the second respondent ('Yeoh') and the third respondent ('Chin') operated the company as if it were a partnership.

Yeoh and Chin have challenged these allegations. They say the company is not a partnership, that there are eight shareholders, and that Kok's alleged beneficial shareholding in Juta is under challenge in Ipoh High Court Sivil Suit No 22–115–94. In any case, his 75,710 shares only gives him a nominal 4.08% of Juta.

From the date of its incorporation until 22 September 1995, Kok was director of Juta, whose sole business appears to have been the completion of a housing project in the Cameron Highlands. Yeoh was also a director of Juta. Evidently there were differences between the directors and the articles of association of Juta permitted the removal of a director by majority vote.

This is what happened on 12 May 1994. Yeoh was unseated. His response was to file a petition No 28–41–94 challenging his removal. Kok and Chin were cited as defendants. The parties came to a compromise. Kok and Chin agreed to buy Yeoh out at RM3.5m, and the petition was not proceeded with. Chin alone signed the agreement and paid RM1.5 m as deposit. Kok was to buy ½ of Yeoh's shares from Chin but he reneged. So Yeoh forfeited the deposit, and with Chin's concurrence, Yeoh was reappointed to the board of Juta on 14 August 1995 at an extraordinary general meeting of which due notice had been given to all the shareholders but Kok did not attend.

Kok's petition was filed just over a month after Yeoh's reappointment on 14 August 1995. It is evident from the petition that Kok wanted Yeoh and/or Chin to buy him out at RM2.82m but they have declined to do so at this price. A notice for another extraordinary general meeting was given for the 22 September 1995 to remove Kok as director. He attended the meeting and voted against it but the resolution was carried.

This petition which was filed the previous day, is not under s 181 of the Act. But the very first prayer is that the court order Yeoh and Chin to purchase his shares at RM2.82m. The winding-up order was only sought by way of an alternative. The petition also set out a prayer for an interim receiver 'to prevent mismanagement of the assets of the company' and in the further alternative that the court should appoint Kok to be a joint signatory of all cheques issued by the company.

Kok completely cut the ground from under his own feet, because his objective was not the winding up of the company at all but a mandatory direction to compel the other shareholders to buy him out at RM2.82m and carry on with the company as a going concern. No legal or factual basis was shown as to how or why this court would ever make such an order.

The application for the interim receiver was made by a summons in chambers filed on 5 October 1995 with a supporting affidavit of the same date. The primary facts alleged in the petition fall far short of the prima facie case required to support a conclusion that the company should be wound up. The facts alleged in the supporting affidavit did not take the matter any further. Until the day this petition was filed, Kok was an active

director of this company, a co-signatory of all cheques, and a person who had full legal responsibility for the management and affairs of Juta. Mere apprehensions of mismanagement are not enough. Kok was very much an interested party with a purpose to serve and all his material allegations were challenged with the result that there was no uncontested evidence on which it could be said that the appointment of an interim receiver was in any way justified. On the evidence before him, we think the learned judicial commissioner came to the correct decision on 25 October 1995 when he dismissed the application with costs.

We now turn to the motion which was filed before us to admit fresh evidence. After dismissal of their interim application on 25 October 1995, Kok's solicitors embarked on proceedings for discovery and obtained orders permitting them to inspect the cheques and accounts of Juta's bankers. Kok himself, whilst he was still a director of the company, made copies of some of the company's documents which he thought would come in useful in furthering his battles with Yeoh. The accusations he chose to make based on these documents and material arising out of discovery proceedings were engrossed into an affidavit which he affirmed on 27 March 1996. His solicitors then filed a formal application on 28 March 1996 for leave to read this affidavit at the hearing of this appeal, which was listed for disposal on 15 April 1996.

Kok's counsel, Mr Hira Singh submitted that he was entitled to put in this fresh evidence without leave and as a matter of right. He relied on r 7 of the Rules of the Court of Appeal 1994. Section 69 of the Courts of Judicature Act 1964 ('the Courts of Judicature Act') is identically worded.

The evidence in question was this. On 25 November 1992, Yeoh and Chin had signed a cash cheque for RM200,000 drawn on Juta's account with Malayan Banking Bhd. This money was said to be for payment to a contractor of Juta named Soonly Fatt Construction and Trading ('Soonly'). The cheque number was MBB 072791. Soonly issued a formal receipt for this cheque in favour of Juta. The cheque was subsequently used by Yeoh to pay a loan taken by him from one Lee Nyan Hon on 8 September 1992. The cheque was paid into Lee Nyan Hon's account. A second cheque dated 25 November 1992 for RM60,000 cash on Juta's account with Public Bank Bhd was signed by Yeoh and Chin. The cheque number is 044388. An official receipt for this cheque was issued by Soonly the same day. The reverse of the cheque is said to show that it was paid into Yeoh's personal account.

Mr Hira Singh invited us to infer from this that Yeoh had been embezzling this money, and that unless the interim receiver was appointed the embezzling would continue. With the greatest respect, this was a *non-sequitur*. There was absolutely no evidence before us that Soonly was not a genuine creditor, and that the receipts given by Soonly were good discharge to Juta to the extent of these payments. Copies of the receipts and cheques in question had been in Kok's possession before this petition was filed.

Section 69(1), (2) and (3) of the Courts of Judicature Act, read as follows:

> 69 Hearing of appeals
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> (1) Appeals to the [Court of Appeal] shall by way re-hearing, and in relation such appeals the [Court of Appeal] shall have all the powers and duties, as to amendment or otherwise, of the High Court, together full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
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> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after date of the decision from which the appeal is brought.
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> (3) Upon appeals from a judgment, after trial or hearing of any case or, matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the [Court of Appeal].

We do not agree with Mr Hira Singh that s 69(2) applies to this case because we are not concerned here with an interlocutory application. Nor does the second limb of section 69(2) apply because the new evidence sought to be adduced related to matters which occurred in 1992.

Section 69(3) relates to appeal from a judgment in the court below after a trial or hearing on the merits. The commentary in the 1 *Supreme Court Practice* 1995 paras 59/10/8 and 59/10/9 at p 996 states that the new evidence will not be admitted unless the *Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489 conditions are satisfied. The High Court dismissed the application to appoint the interim receiver after a hearing on the merits. The appellant did not satisfy the *Ladd v Marshall* conditions because he was in possession of the 'new' evidence before the petition was filed. In any event, without proof that the Soonly receipts were not genuine, the evidence was irrelevant. Yeoh was not the only shareholder of Juta. If Juta had a right of resource against him for these moneys (and there is nothing to suggest that), it does not mean Juta has to be wound up. In any case, the conduct of the appellant has been such that if the admission of the new evidence was a matter of discretion only we would still have exercised it against him.

A collateral point which arose in this appeal was Mr Hira Singh's objection to the locus standi of Mr Chee who went on record as counsel for Public Bank. In a winding-up petition, a creditor has a right to appear at the hearing of the petition: See r 28 of the Companies (Winding-up) Rule 1972. The bank was made subject to discovery proceedings in the High Court. The remarks of Hoffman LJ in the *Re Saul D Harrison & Sons* [1994] BCC 162 at p 179 whether a party should be permitted to fish for adverse material, in the absence of any specific allegations in the petition itself may be of some interest here. However since we have dismissed this appeal in favour of the bank, we think that the necessity for the bank to be added as a co-defendant had best be ventilated in the court below if it

wishes to participate in this litigation, or for that matter, if the petitioner wishes to obtain orders which directly affects the bank's interests.

Appeal dismissed.

Reported by Isabel Liong